

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GYPSUM RESOURCES, LLC, a Nevada)
limited liability company,)

Case No.: 2:19-cv-00850-GMN-EJY

Plaintiff,)

vs.)

ORDER

CLARK COUNTY, *et al.*,)

Defendants.)

CLARK COUNTY, *et al.*,)

Counter-Claimants,)

vs.)

GYPSUM RESOURCES, LLC, a Nevada)
limited liability company,)

Counter-Defendant.)

Pending before the Court is Plaintiff and Counter-Defendant Gypsum Resources, LLC's ("Gypsum's") Partial Motion for Summary Judgment, (ECF No. 38). Defendants and Counter-Claimants Clark County and Clark County Board of Commissioners (collectively, "Clark County") filed a Response, (ECF Nos. 39, 40, 41), to which Gypsum filed a Reply,¹ (ECF No. 50).

¹ Gypsum also filed a Notice of Objections to the Evidence Offered in Clark County's Opposition to Gypsum's Motion for Partial Summary Judgment, (ECF No. 51), and a Notice of Objections to the Evidence Offered in the Statement of Undisputed Facts in Support of Clark County's Opposition to Gypsum's Motion for Partial Summary Judgment, (ECF No. 52). The Court considers Gypsum's objections but finds that they do not impact the Court's determination of Gypsum's Motion for Partial Summary Judgment for the reasons set forth below.

Further pending before the Court is Gypsum’s Motion for Status Conference to Set Trial and Deadlines, (ECF No. 53). Clark County filed a Response, (ECF No. 57), to which Gypsum filed a Reply, (ECF No. 58).

Further pending before the Court is Clark County’s unopposed Motion for Leave to File Excess Pages, (ECF No. 47).

For the reasons discussed below, the Court DENIES in part Gypsum’s Motion for Partial Summary Judgment, DENIES Gypsum’s Motion for Status Conference to Set Trial and Deadlines,² and GRANTS Clark County’s Motion for Leave to File Excess Pages.³

I. BACKGROUND

Gypsum is a Nevada limited liability company and owner of approximately 2,400 acres of real property encompassing Blue Diamond Hill and the Hardie Gypsum Mine located in Clark County, Nevada (the “Gypsum Property”). (Am. Compl. ¶ 1, ECF No. 9). The Clark County Board of Commissioners (“CCBD”) is the governing board authorized to conduct business, adopt laws, and adjudicate land use matters on behalf of Clark County. (*Id.* ¶ 2).

A. History of the Gypsum Property

In 1990, the United States Congress established the Red Rock Canyon National Conservation Area (“RRCNCA”), thereby designating approximately 200,000 acres of land as a conservation area to be administered by the Bureau of Land Management. (*Id.* ¶ 5). Several years later, the Nevada Legislature enacted the Red Rock Canyon Conservation Area act,

² Gypsum petitions the Court to convene a status conference to set a trial date and related trial deadlines because “there is going to be a trial, as the pending motions for summary judgment do not dispose of all claims.” (Mot. Status Conference 2:15–16, ECF No. 53). This may be true, but the Court’s determination on Gypsum’s Motion for Partial Summary Judgment and Clark County’s separate Motion for Summary Judgment, (ECF No. 35), necessarily shapes what issues will be litigated at trial. Therefore, the Court finds that any status conference to set a trial date and related trial deadlines is premature prior to the Court’s determination on the pending motions for summary judgment and partial summary judgment.

³ The Court grants Clark County’s Motion for Leave to file Excess Pages given that Gypsum does not oppose the Motion.

1 restricting land use for property surrounding the RRCNCA. (*Id.* ¶ 6). Clark County
2 subsequently established the Red Rock Design Overlay District, further restricting how land
3 surrounding the RRCNCA could be used and developed. (*Id.* ¶ 7).

4 In 2003, Gypsum acquired the Gypsum Property with the intention of developing the
5 Gypsum Property as a master-planned residential community. (*Id.* ¶ 8). At the time of the
6 purchase, the Gypsum Property was zoned “RU,” designating that one home could be built
7 every two acres throughout the property. (*Id.* ¶ 10). Gypsum intended to submit a zoning
8 variance request to the CCBD to develop its residential community, but before it could do so
9 the Nevada legislature enacted SB 358, a bill which precluded Gypsum from seeking a zoning
10 variance. (*Id.* ¶¶ 10–16). Coinciding with the enactment of SB 358 was the passage of
11 Ordinance 2914 by Clark County, which expanded the Red Rock Design Overlay District to
12 prohibit land use applications to increase the zoning density for properties within the district.
13 (*Id.* ¶ 16).

14 **B. Preceding Litigation**

15 In 2005, Gypsum filed suit in this court against the State of Nevada and Clark County,
16 challenging the constitutionality of SB 358 and Ordinance 2914. (*Id.* ¶¶ 18–20). In 2010,
17 Gypsum and Clark County resolved the litigation by entering into a written Stipulation and
18 Settlement Agreement, (the “Settlement Agreement”). (*Id.* ¶ 21). The Settlement Agreement
19 required Clark County and CCBD to amend the Clark County Code to allow an exception to
20 the “Red Rock Design Overlay District,” in addition to authorizing Gypsum to submit a Major
21 Project Application for a master-planned residential development with “residential densities
22 higher than those allowed in the holding RU zoning” (*Id.* ¶ 22–23). Moreover, the
23 Settlement Agreement instituted several mandatory conditions that any subsequent Major
24 Project Application proposed by Gypsum would have to comply with. Two of these conditions
25 are of note. First, “[t]he parties agree that any Major Project Application that seeks increased

density (residential) or intensity (non-residential) must propose a primary access to and from the East.” (Settlement Agreement 54:22–24, Ex. D to MSJ, ECF No. 35-4). This condition would later become a requirement mandating that Gypsum obtain a right-of-way approval from the Bureau of Land Management (“BLM”) to construct a road before any of their Major Project Applications would be approved. (12/05/2018 BCC Agenda at 204, Ex. DD to Clark County MSJ, ECF No. 36-2). Second, and related to the first condition, the Settlement Agreement mandated that any approved primary access “shall not connect to State Route 159.” (Settlement Agreement 55:1–3, Ex. D to MSJ).

The Settlement Agreement further provided that Clark County and CCBD would process Gypsum’s subsequent Major Project Application in “good faith.” (*Id.* ¶ 24). Specifically, the Settlement Agreement stated that, “[t]he County agrees that it will process the Major Project Application under the Major Projects in good faith. Gypsum understands that the County, by this Agreement, cannot and is not committing to approval of any particular Major Project and/or any particular densities or uses.” (Settlement Agreement 54:17–20, Ex. D to MSJ).

As relevant here, Gypsum contends that Clark County subsequently engaged in a pattern of obstruction and delay after entering into the Settlement Agreement to prevent Gypsum from developing the Gypsum Property. (Gypsum Partial Mot. Summ. J. (“MSJ”) 20:11–21, ECF No. 38). Gypsum thereby argues that Clark County violated the provision of the Settlement Agreement which guaranteed that Clark County would process Gypsum’s Major Project Application(s) in “good faith.” (*Id.*)

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that

1 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
2 (1986). A dispute as to a material fact is genuine if there is a sufficient evidentiary basis on
3 which a reasonable fact-finder could rely to find for the nonmoving party. *See id.* “The amount
4 of evidence necessary to raise a genuine issue of material fact is enough ‘to require a jury or
5 judge to resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral*
6 *Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S.
7 253, 288–89 (1968)). “Summary judgment is inappropriate if reasonable jurors, drawing all
8 inferences in favor of the nonmoving party, could return a verdict in the nonmoving party’s
9 favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United*
10 *States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary
11 judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*,
12 477 U.S. 317, 323–24 (1986).

13 In determining summary judgment, a court applies a burden-shifting analysis. “When
14 the party moving for summary judgment would bear the burden of proof at trial, it must come
15 forward with evidence which would entitle it to a directed verdict if the evidence went
16 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
17 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
18 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
19 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
20 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
21 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
22 party failed to make a showing sufficient to establish an element essential to that party’s case
23 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
24 24. If the moving party fails to meet its initial burden, summary judgment must be denied, and
25 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,

1 398 U.S. 144, 159–60 (1970).

2 If the moving party satisfies its initial burden, the burden then shifts to the opposing
3 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
4 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
5 the opposing party need not establish a material issue of fact conclusively in its favor. It is
6 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
7 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
8 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). However, the nonmoving party “may not rely on
9 denials in the pleadings but must produce specific evidence, through affidavits or admissible
10 discovery material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,
11 1409 (9th Cir. 1991), and “must do more than simply show that there is some metaphysical
12 doubt as to the material facts.” *Orr v. Bank of America*, 285 F.3d 764, 783 (9th Cir. 2002)
13 (internal citations omitted). “The mere existence of a scintilla of evidence in support of the
14 plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252. In other words, the
15 nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations
16 that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).
17 Instead, the opposition must go beyond the assertions and allegations of the pleadings and set
18 forth specific facts by producing competent evidence that shows a genuine issue for trial. *See*
19 *Celotex Corp.*, 477 U.S. at 324.

20 At summary judgment, a court’s function is not to weigh the evidence and determine the
21 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
22 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
23 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
24 not significantly probative, summary judgment may be granted. *See id.* at 249–50.

25 Fed. R. Civ. P. 56(d) provides that “[i]f a nonmovant shows by affidavit or declaration

that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” To obtain relief under Rule 56(d), the nonmovant must show “(1) that [he or she] ha[s] set forth in affidavit form the specific facts that [he or she] hope[s] to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are ‘essential to resist the summary judgment motion.’” *State of Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

III. DISCUSSION

Gypsum’s Amended Complaint asserts the following claims: (1) violation of its rights under the Fifth Amendment’s Takings Clause; (2) violation of its Procedural and Substantive Due Process rights under the Fourteenth Amendment; (3) violation of its rights under the Equal Protection Clause of the Fourteenth Amendment; (4) *Monell* liability pursuant to 42 U.S.C. § 1983; (5) a separate, or stand-alone, claim for 42 U.S.C. § 1983 liability; (5) breach of contract; (6) breach of the implied covenant of good faith and fair dealing; (7) a petition for a writ of mandamus; and (8) injunctive relief. (*See generally* Am. Compl., ECF No. 9).

By the instant motion, however, Gypsum moves for partial summary judgment only as to its Fourteenth Amendment Procedural and Substantive Due Process claim. (*See generally* Gypsum Partial MSJ). The Court discusses this claim below, beginning with an analysis of whether Clark County violated Gypsum’s Procedural Due Process rights by allegedly failing to adhere to terms of the Settlement Agreement which stipulated that Clark County would process Gypsum’s Major Project Application “in good faith.”

A. Procedural Due Process

Assessment of Procedural Due Process claims proceed by first determining whether the plaintiff was deprived a liberty or property interest by the government. *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1980). “[I]t has long been settled that a contract can create a

1 constitutionally protected property interest.” *San Bernardino Physicians’ Services Medical*
 2 *Group, Inc. v. San Bernardino Cnty.*, 825 F.2d 1404, at 1407-1408 (9th Cir. 1987). However,
 3 “not every contract with a governmental entity creates a property interest protected under the
 4 Due Process Clause.” *Oceanside Golf Institute, Inc. v. City of Oceanside*, 876 F.2d 897, 897
 5 (9th Cir. 1989). As posited by the United States Court of Appeals for the Second Circuit, the
 6 operative question then becomes: “[W]hat is necessary to elevate a mere contract right to the
 7 level of a protectable entitlement[?]” *Local 342, Long Island Pub. Serv. Emps., UMD, ILA,*
 8 *AFL-CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994).

9 Here, Gypsum’s expectation is derived from the express terms of the Settlement
 10 Agreement. (Gypsum Partial MSJ 20:11–21). Thus, to determine whether Gypsum has a
 11 constitutionally protected property interest, the Court must look to the terms of the Settlement
 12 Agreement governing the process of its Major Project Application(s). *Cf. Clukey v. Town of*
 13 *Camden*, 717 F.3d 52, 57–59 (1st Cir.2013) (finding a protected property interest where the
 14 CBA between the defendant municipality and the plaintiff’s union stated that laid-off
 15 employees had a right to be recalled to their former positions within a year of being laid off).
 16 The operative provision relied on by Gypsum states:

17 The County agrees that it will process the Major Project Application under the
 18 Major Projects in good faith. Gypsum understands that the County, by this
 19 Agreement, cannot and is not committing to approval of any particular Major
 Project and/or any particular densities or uses.

20 (Settlement Agreement 6:22–26, Ex. D to MSJ).

21 Although written as a single provision, the paragraph above contains two separate and distinct
 22 guarantees. The first sentence provides that Gypsum will receive a “good faith,” or
 23 fair process. The second asserts that Clark County maintains full discretion to
 24 approve or deny Gypsum’s Major Project Application. Here, Gypsum contends its vested
 25 property interest is derived from the first rather than the second sentence. For the reasons set

1 forth below, however, the Court finds this sentence fails to provide Gypsum with a vested
2 property interest.⁴

3 At its core, Gypsum's argument is that it has a protected property interest in the process
4 by which Clark County reviews its Major Project Application. In effect, Gypsum claims a
5 vested property interest in the means by which its Major Project Application is considered,
6 rather than the end result concerning whether it is approved. Thus, Gypsum's claimed
7 entitlement for a "fair process" is no more than a claimed entitlement to process itself.
8 However, "[p]roperty' cannot be defined by the procedures provided for its deprivation any
9 more than can life or liberty." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).
10 Indeed, "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive
11 interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461
12 U.S. 238, 250 (1983).

13 Detailed and extensive procedural requirements may be relevant as to whether a separate
14 substantive property interest exists, but the procedures themselves cannot constitute the
15 property interest. *See Shanks v. Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008) ("Absent a
16 substantive property interest in the outcome of the procedure, Logan Neighborhood is not
17 constitutionally entitled to insist on compliance with the procedure itself."); *Robbins v. U.S.*
18 *Bureau of Land Management*, 438 F.3d 1074, 1085 (10th Cir. 2006) ("However, it is well
19 established that 'an entitlement to nothing but procedure' cannot be 'the basis of a property
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22 ⁴ The Court notes that even if Gypsum alternatively contended it had a vested property interest under the second
23 sentence, this argument would still fail. Specifically, the provision expressly states that Clark County maintained
24 the discretion to ultimately accept or deny Gypsum's Major Project Application. (*Id.*). "Because the
25 government's land zoning officials retain discretion to grant or deny an application for rezoning, [Gypsum] has
no protected entitlement to, and thus no property interest in, a change in zoning or the process to obtain a desired
change in zoning." *Gypsum Resources, LLC v. Guinn*, No. 2:05-cv-0583, 2008 WL 872835, at *5 (D. Nev. Mar.
27, 2008); *see Nunez v. City of Los Angeles*, 147 F.3d 867, 873 n.8 (9th Cir. 1988) (holding state law creates a
constitutionally protected property interest where there are significant limitations on a decision maker's
discretion).

interest.”) (quoting *Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748, 749 (2005)); *Richardson v. Twp. of Brady*, 218 F.3d 508, 517–18 (6th Cir. 2000) (holding that a plaintiff “can have no protected property interest in the procedure itself”); *Swartz v. Scruton*, 964 F.2d 607, 610 (7th Cir. 1992) (“Thus, Swartz’s asserted legitimate claim of entitlement to process—the ‘method’—by which his merit pay increase is determined is not a constitutionally protected property interest.”). Therefore, Gypsum’s “right,” pursuant to the Settlement Agreement is not the kind of right to which a property interest may attach, regardless of the expense that these proceedings may entail, and the consequences of a negative outcome.⁵ Because Gypsum has not identified a viable property interest protected by Procedural Due Process, it cannot demonstrate that they have been deprived of such an interest without due process. Therefore, Gypsum’s Procedural Due Process claim fails as a matter of law.

B. Substantive Due Process

To allege a violation of the Fourteenth Amendment’s Substantive Due Process Clause, a plaintiff must show that a state actor has deprived the plaintiff of a constitutionally protected interest in life, liberty, or property. *See Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). Substantive Due Process protection is usually reserved for the vindication of fundamental rights, such as matters relating to marriage, family, and procreation. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994). Thus, where, as here, a plaintiff relies on Substantive Due Process to challenge governmental actions that do not impinge on fundamental rights, the court is not required to find that the defendant’s actions actually advanced their stated purposes; the court must ‘merely look to see whether the government could have a legitimate reason for acting as it did.’ *Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1262 (9th Cir. 1994).

Substantive Due Process can be used to address arbitrary governmental interference that

⁵ For the same reason, Gypsum’s contention that it has a protectable property interest to a “good faith” process under NRS § 278A.520(2) also fails. (Gypsum Reply Partial MSJ 5:24–26, ECF No. 50).

1 has no reasonable justification. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998);
2 *Stamas v. Cnty. of Madera*, 795 F. Supp. 2d 1047, 1071 (E.D. Cal. 2011). The Supreme Court
3 has explained that a governmental action will violate Substantive Due Process if it is “clearly
4 arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or
5 general welfare.” *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926);
6 *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005). Traditionally, courts have held that a
7 Substantive Due Process claim cannot be used to vindicate a constitutional right in a 42 U.S.C.
8 § 1983 action if the plaintiff’s claim could be analyzed under another explicit textual
9 constitutional source. *See, e.g., Graham v. Connor*, 490 U.S. 386, 394–95 (1989) (determining
10 that Fourth Amendment rather than Substantive Due Process should be used to analyze
11 excessive force claims); *Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001) (finding
12 that because the First Amendment explicitly covers employment termination case, First
13 Amendment and not Substantive Due Process should guide analysis). However, in *Lingle v.*
14 *Chevron U.S.A., Inc.*, the Supreme Court contrasted the Takings Clause, which “presupposes
15 that the government has acted in pursuit of a valid public purpose” with “government action
16 [that] is found to be impermissible-for instance because it . . . is so arbitrary as to violate due
17 process[,]” which “[n]o amount of compensation can authorize.” 544 U.S. at 543. Following
18 *Lingle*, the Ninth Circuit explained in *Crown Point Development, Inc. v. City of Sun Valley*, that
19 “the Fifth Amendment w[ill] preclude a due process challenge only if the alleged conduct is
20 actually covered by the Takings Clause.” 506 F.3d 851, 855 (9th Cir. 2007).

21 Since *Crown Point*, the Ninth Circuit has found that the Fifth Amendment does not
22 automatically preempt a Substantive Due Process claim that alleges a defendant’s land use
23 action or regulation lacked any substantial relation to public health, safety, or general welfare.
24 *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011); *Crown*
25 *Point*, 506 F.3d at 856. In light of these decisions, a Substantive Due Process claim

1 challenging a wholly illegitimate land use action or regulation is not foreclosed by the Takings
2 Clause. *See Colony Cove*, 640 F.3d at 960; *Crown Point*, 506 F.3d at 852–53.

3 Here, Gypsum moved for summary judgment only as to it's Fourteenth Amendment Due
4 Process claims even though it separately alleges a Fifth Amendment Takings claim. (*See*
5 *generally* Gypsum Partial MSJ); (Am. Compl.). If the Court separately finds that Gypsum
6 states a legitimate Takings Claim in its analysis of Clark County's Motion for Summary
7 Judgment, (ECF No. 35), then any present determination of Gypsum's Substantive Due Process
8 claim would be preempted by its Takings claim. Therefore, any analysis of the merits of
9 Gypsum's Substantive Due Process claim is premature prior to the Court's separate decision on
10 Gypsum's Takings Claim. Accordingly, the Court defers on examining Gypsum's Fourteenth
11 Amendment Substantive Due Process claim at this time. The Court will address Gypsum's
12 Substantive Due Process claim with Clark County's Motion for Summary Judgment.

13 Accordingly, Gypsum's Motion for Partial Summary Judgment as to its Fourteenth
14 Amendment Procedural Due Process claim is DENIED. The Court otherwise DEFERS ruling
15 on Gypsum's Fourteenth Amendment Substantive Due Process claim.

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